HICKS EUGENE READ

IBLA 74-141 Decided June 4, 1974

Appeal from the August 21, 1973, decision of Alaska State Office, Bureau of Land Management, holding a homestead entry for cancellation. (AA-2648).

Affirmed.

Alaska: Homesteads--Homesteads (Ordinary): Residence--Homesteads (Ordinary): Final Proof

Final proof under a homestead claim in Alaska is not acceptable where it shows that the homesteader did not establish his residence on the claim until more than two years after filing his notice of settlement.

Alaska: Homesteads--Homesteads (Ordinary): Residence

Residence is not established under the homestead law by occasional visits to the homestead site to select areas suitable for cultivation and a cabin site. There must be present both the intent to make the homestead a permanent home and such actual occupancy as will evidence that intent within six months of filing the homestead entry, or within one year if an extension is granted.

Administrative Procedure: Adjudication--Hearings--Homesteads (Ordinary): Residence

The cancellation of a homestead entry and the rejection of the final proof are proper when the final proof on

its face shows a failure by the entry man to satisfy the residence requirement of the homestead law.

Homesteads (Ordinary): Generally--Homesteads (Ordinary): Cultivation--Homesteads (Ordinary): Residence

The inability of an entryman to meet the financial demands of residing upon and developing his entry is not a circumstance which will excuse his non-compliance with the requirements of the law and regulations.

APPEARANCES: Hicks Eugene Read, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Hicks Eugene Read has appealed from the August 21, 1973, decision of the Alaska State Office, Bureau of Land Management, which rejected his final proof and held for cancellation his homestead entry. (AA-2648). That action was predicated on the finding that Read's final proof was deficient on its face, since he had not established residence within the time required by statute, 43 U.S.C. § 169 (1970), and by regulation, 43 CFR 2567.5(a).

The pertinent statute, 43 U.S.C. § 169 (1970) provides that:

If, at any time after the filing of the affidavit as required in section 162 of this title and before the expiration of the three years mentioned in section 164 of this title, it is proved, after due notice to the settler, to the satisfaction of the Secretary of the Interior or such officer as he may designate that the person having filed such affidavit has failed to establish residence within six months after the date of entry, or abandoned the land for more than six months at any time, then, and in that event, the land so entered shall revert to the Government: Provided, that the three years' period of residence herein fixed shall date from the time of establishing actual permanent residence upon the land: And provided further, That where there may be climatic reasons, sickness, or other unavoidable cause, the Secretary of the Interior or such officer

> as he may designate may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe.

The appellant filed his notice of location of settlement or occupancy claim on January 31, 1968. That filing was acknowledged by the Alaska State Office (BLM) on April 11, 1968. However, in his patent application, appellant states that he did not establish residence until June 15, 1970, nearly two and a half years after his original filing. This statement is corroborated by two witnesses.

By letter dated February 14, 1973, the Alaska State Office notified the appellant that his application for patent was not sufficient since he had not shown that residence was established within, at most, one year. That office allowed appellant additional time to submit evidence that he actually had established residence within the required time period.

Appellant then submitted a statement of his own and that of two witnesses suggesting that he had tried to establish residence in 1968 and 1969 but had been unable to do so for two principal reasons, viz. he was working elsewhere to support his family and could not afford to establish residence on the homestead and he had to carry the burden of caring for his mother who was ill at that time. Elsewhere in the record it further appears that the roads to his homestead entry were nearly impassable at that time.

The Department has consistently held that the inability of an entryman to meet the financial demands of residing upon and developing his entry is not a circumstance which will excuse his non-compliance. Rune E. Safve, 13 IBLA 212, 220 (1973) 1/; United States v. Lance, 73 I.D. 218 (1966); Virgil H. Belishe, A-29954 (March 24, 1964); LaDean Butler, A-28673 (February 7, 1962); Joseph S. Holt, A-28468 (November 22, 1960). Even though the other factors might well have been sufficient to support an application for a six-month extension to establish residence (had such an application been filed), the merits of such an application need not be considered at this time since nearly two and a half years had passed before appellant actually established residence on his homestead entry. This Board is without authority to excuse failure to establish residence within one year no matter how extenuating the circumstances may be. See, e.g., Melvin O. Wright, A-3039 (December 29, 1967); Hulse v. Griggs, 67 I.D. 212 (1960).

1/ Suit for judicial review pending. Safve v. Secretary of the Interior, et al., Civ. No. A-173-73 (D. Alaska).

It is clear from appellant's own assertion that he did not establish residence prior to June 15, 1970. It is also clear the such other facts as appear in the record support that conclusion. For instance, prior to June 15, 1970, appellant maintained and resided in a house in town to pursue employment as an insurance agent. There can be no doubt that the house in town was regarded as appellant's home. Both he and his family lived there until June 15, 1970, and he carried on his insurance business in town. This Department has consistently held that such conduct as this does not constitute residence on the homestead, but rather, residence in town. In United States v. Cooke, 59 I.D. 489 (1947), the Department undertook an extensive review of substantially all prior cases on residence with respect to the homestead law. It was held in that case that

> [T]he initiation of homestead residence so closely resembles acquisition of a domicile of choice that its establishment is determined under the same rules as govern cases of technical domicile, with such modifications, however, as the terms of the homestead law necessitate and as the Secretary in his discretion considers the spirit of the homestead law to require. Moreover, there is no question but that homestead residence is in all points identical with a domicile of choice where the homestead applicant removes from the jurisdiction of one State of the Union to that of another, complies with the rules of domicile, and fully observes the additional requirements of the homestead law.
>
> * * * * * * * *
>
> The actual residence, or bodily presence, must be accompanied by a certain intent if the place of new sojourn or physical habitancy is to be converted into such a home as makes the basis of legal domicile. In other words, a domicile of choice can be established only by intent and by act, animo et facto. It is not otherwise with homestead entry. These same principles underlie the terms of the homestead law. Under sections 2290, 2291, and 2297, Revised Statutes, the homestead applicant is required to swear that his "purpose," or intent is "in good faith to obtain a home for himself," and besides making sworn declaration or that intent, he is required to perform the act, namely to establish actual permanent residence upon the land within 6 months from the date of entry.

> The chief rules implementing these common principles, here phrased with particular reference to homestead rather than domicile, are as follows: First, there must be intent to make the desired public lands the applicant's home, or fixed abode. This intent is called the animus manendi, the intent to remain, and implicit in it, of course, is the intent to no longer to have a home at the former residence, or domicile; second, there must be actual bodily presence on the lands entered, this act of inhabitancy of the entry being called the factum. Moreover, these two elements must coexist. The mere intent to acquire a new home on the desired lands, if unaccompanied by the factum of bodily removal to the entry and bodily presence there, avails nothing; nor does the fact of removal and presence if those acts be not animated by intent. (Emphasis in original).
>
> Id. at 501, 502.

Therefore, there can be no doubt that appellant did not establish residence on his homestead claim until June 15, 1970, since neither he nor his family made any serious attempt to actually live there prior to that time. See also, United States v. Booth, 76 I.D. 73 (1969); Edwin P. Knapp, 70 I.D. 441 (1963); Henry J. Ernst, A-27196 (November 7, 1955).

The cancellation of a homestead entry and the rejection of final proof without a hearing is proper when the final proof shows on its face that the residence requirements of the homestead law have not been met. Lois A. Mayer, 7 IBLA 127, 129 (1972); cf. Gene L. Brown, 7 IBLA 71, 73 (1972).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Frederick Fishman
Administrative Judge